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No. 04-1544

In The Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. What is the scope of the probate exception to federal jurisdiction?

2. Did Congress intend the probate exception to apply where a federal court is not asked to probate a will, administer an estate, or otherwise assume control of property in the custody of a state probate court?

3. Did Congress intend the probate exception to apply to cases arising under the Constitution, laws, or treaties of the United States (28 U.S.C. § 1331), including the Bankruptcy Code (28 U.S.C. § 1334), or is it limited to cases in which jurisdiction is based on diversity of citizenship?

4. Did Congress intend the probate exception to apply to cases arising out of trusts, or is it limited to cases involving wills?

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings below are Vickie Lynn Marshall and E. Pierce Marshall.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 392 F.3d 1118 (Appendix to Petition For Writ of Certiorari ("App.") 1-38). The opinions of the United States District Court for the Central District of California are reported at 275 B.R. 5 (App. 39-147) and 264 B.R. 609 (App. 148-88). Opinions of the United States Bankruptcy Court for the Central District of California are reported at 257 B.R. 35 (App. 189-200) and 253 B.R. 550 (App. 201-21); an additional opinion of that court is unpublished (Joint Appendix ("JA") 38-44).

JURISDICTION

The Court of Appeal issued its opinion on December 30, 2004. It denied a timely petition for rehearing and rehearing *en banc* on February 16, 2005. App. 222. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1), 1331 and 1334.

STATUTES INVOLVED

The text of 28 U.S.C. §§ 1331, 1332 and 1334 are set out in the Appendix To Petition For Writ of Certiorari, at pages 223-26.[1]

STATEMENT OF THE CASE

A. The Intended *Inter Vivos* Trust.

Petitioner Vickie Lynn Marshall ("Vickie") is the surviving widow of J. Howard Marshall II ("Howard"), who died in August 1995. App. 40. Howard and Vickie met in

[1] 28 U.S.C. § 1334 was amended effective April 20, 2005, but the amendments are not relevant here.

1991; within a week, Howard proposed marriage. App. 67-69. The couple married in June 1994, after a nearly three-year courtship. App. 67-73. Vickie was 26 years old and a well-known model and actress, App. 67, 71-72; Howard was 89 years old and one of the wealthiest men in Texas, with assets exceeding $1.6 billion, App. 40, 149-50, 204-05.

Since 1982, Howard's assets had been held in a trust that named his son, respondent E. Pierce Marshall ("Pierce"), the primary beneficiary upon Howard's death. App. 3. After Howard met Vickie, he instructed his attorneys to create a separate *inter vivos* trust for her benefit, consisting of half the appreciation of his assets from the time of their marriage. App. 78-85, 87-90, 133-36, 204-05, 215-17. Vickie never realized the benefits of that trust, however, because – as both lower courts found – Pierce suppressed or destroyed the trust instrument and stripped Howard of his assets before his death. App. 86-136, 144-46, 202-07, 216-19.

B. The Initial Probate Proceedings.

After Howard's death, Pierce refused to provide Vickie with his will or trust. Excerpts of Record ("ER") 5614. Accordingly, in August 1995, Vickie filed a petition in Texas state court alleging that Howard had died intestate. ER 816.[2] The following week, Pierce initiated a Texas probate proceeding. ER 836-45.[3]

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[2] During Howard's last illness, Pierce had initiated a state court guardianship proceeding; there, Vickie asserted that Pierce was interfering with her right to spousal support and questioned the validity of several transactions in which Pierce was involved. The guardianship proceeding terminated when Howard died. JA 9-21; Supplemental Excerpts of Record ("SER") 12595-96.

[3] Earlier, Pierce had opened a probate in Louisiana, but it was dismissed for lack of jurisdiction in 1998. App. 40-41, 97; ER 843.

Pierce's older brother, who received nothing under Howard's will or trust, opposed the Texas probate application and filed a will contest. SER 5880. Vickie initially did not participate in the probate proceeding, but she ultimately joined the pending will contest in 1998. ER 1319; SER 6757.[4]

C. Vickie's Chapter 11 Bankruptcy; Pierce's Creditor's Claim and Vickie's Counterclaim.

Meanwhile, in January 1996, Vickie filed for bankruptcy in California. App. 41; SER 5987. Pierce filed an adversary complaint and creditor's claim in the bankruptcy proceeding alleging that Vickie, through her lawyers, defamed him by publicly accusing him of forgery, fraud and overreaching to gain control of Howard's assets before his death. App. 151-52, 179-80; SER 6020-26.

Vickie objected to the creditor's claim and answered the adversary complaint, pleading truth as an affirmative defense. App. 42-43, 152; SER 6727-31; DC 98, pp. BK 138, 163. She also asserted a compulsory counterclaim against Pierce for tortious interference with her expectancy of an *inter vivos* gift from Howard. App. 42-43, 152, 197; SER 8702; JA 23-25. This was the first time she asserted that claim in any court. SER 6757, 12260, 12453.[5]

In March 1999, the bankruptcy court confirmed Vickie's reorganization plan, under which creditors would be paid from any proceeds of her counterclaim against

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[4] Vickie filed a spousal support motion in August 1996, but it did not implicate Howard's will or trust and made no personal claims against Pierce. U.S.D.C. Docket ("DC") No. 123, p. AP 255.

[5] The bankruptcy court determined that Vickie's tortious interference counterclaim was a "core" bankruptcy proceeding under 28 U.S.C. § 157(b)(2)(C) since it was a counterclaim that arose out of the same transactions and occurrences as Pierce's creditor's claim. App. 197; JA 38-39.

Pierce, and discharged all prior claims. SER 6065-91, 12453. Subsequently, the court summarily resolved Pierce's defamation claim in Vickie's favor. App. 43, 153; SER 7940-42, 8086-87, 10603.

Shortly before trial of Vickie's tortious interference claim, Pierce asserted, *in limine*, that it was barred by the "probate exception" to federal jurisdiction. App. 195. The court denied the motion as untimely; later, it found on the merits that the probate exception did not apply. App. 192-95; SER 7510-11.

The bankruptcy court tried Vickie's tortious interference claim in late 1999, entering a final judgment for her in December 2000. App. 189-221; JA 38-48. The court found that Howard had instructed his attorneys to create an *inter vivos* trust for Vickie, consisting of half the appreciation of his assets from the time of their marriage, but that Pierce tortiously prevented it. App. 202-07, 213-20.[6] The court also found that Pierce had engaged in "massive discovery abuse," including destroying documents relevant to Vickie's claim. App. 207-13; *see* ER 2235-48. The court awarded Vickie compensatory damages of more than $449 million (the amount of the intended trust), plus punitive damages of $25 million. App. 198-99, 219-21.

D. The Texas Probate Trial.

When the bankruptcy court entered final judgment for Vickie in December 2000, the Texas probate trial was in progress. SER 8426-27, 12453. Vickie immediately dismissed her claims in Texas, including a tortious interference claim she had added in January 2000 after Pierce sought dismissal of her federal suit. ER 2863; SER 8426-27, 10306-09, 12453. She also asked the probate court to

[6] These findings were based, in part, on facts established as sanctions for discovery violations. App. 204 n.5; ER 2235-48.

dismiss Pierce's sole claim against her, which sought sanctions for filing allegedly frivolous pleadings. ER 3446-72; SER 8422-27, 10604-05 n.4.

The probate court denied Vickie's request and refused to give preclusive effect to the bankruptcy judgment, stating that, "I don't think I have an obligation to give [it] full faith and credit." SER 10604-05 n.4; *see also* ER 3472; SER 8473 ("I don't care what the California court did. It has no impact on me."), 8485-86, 8492-94. Instead, it permitted Pierce to amend his action to add new claims against Vickie involving issues that the bankruptcy court had already decided. SER 8609-16, 8638-39, 3994-95, 12260-61, 12453.[7]

Following trial, the Texas jury returned a special verdict for Pierce. The verdict addressed only one question (Question 66) pertaining to Vickie: "Do you find that Vickie . . . did not have *an agreement* with J. Howard . . . that he would give her one-half of all his property?" JA 93 (emphasis added); SER 6624; *see also* SER 12261, 12453.[8]

E. The Texas Probate Judgment.

Pierce obtained a judgment against Vickie in Texas based on Question 66 in December 2001. ER 3782, 4706,

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[7] After the Texas court refused to recognize the bankruptcy judgment, the bankruptcy court enjoined Pierce from proceeding in Texas on claims that violated Vickie's bankruptcy discharge or had already been resolved against him; in response, the Texas court enjoined Vickie from seeking further injunctive relief from the bankruptcy court. ER 3989; SER 6614-96, 8431, 8438, 8461-64, 8497, 8543, 8583, 12262, 12256, 12458, DC 711, pp. AP 27076-86. We do not detail this complicated history here because while it may bear upon a preclusion analysis, it is not relevant to the jurisdictional issue before this Court.

[8] Notably, Vickie had never asserted she had an *agreement* with Howard; her claim was always that Pierce tortiously interfered with an intended *gift*. SER 8584-85, 12261 & n.2, 12453 & n.9.

4736; SER 6623-24, 12261, 12453-54. Explaining the scope of its judgment, the probate court said it "want[ed] to make clear" that it was "deciding all the issues concerning *the Estate*" and "[n]ot anything to do with what complaints [Vickie] has *against [Pierce].*" SER 8663-64 (emphasis added). It further emphasized: "We didn't try any issue of tortious interference with *inter vivos* gift in this case at all." SER 8660. Nonetheless, at Pierce's urging, the judgment included findings on issues not decided by the jury, including that "[Howard] did not intend to give [Vickie] a gift or bequest from [his] Estate . . . either prior to or upon his death." JA 130; SER 8677; *see also* SER 8654-78, 10353-95, 10600-11.

F. The District Court's *De Novo* Review And Judgment Against Pierce.

Pierce appealed the bankruptcy court judgment to the district court in January 2001. App. 148-49; DC 1. In a detailed analysis, the court determined that the probate exception did not apply. App. 158-70. It also concluded, contrary to the bankruptcy court, that although Vickie's claim was a compulsory counterclaim to Pierce's defamation claim, it was not a "core" bankruptcy proceeding under 28 U.S.C. § 157(b)(2)(C). App. 171-87; SER 8702. Thus, it treated the bankruptcy court's judgment as proposed, rather than final, and undertook a "comprehensive, complete and independent review of" the bankruptcy court's determinations. App. 187.

During its *de novo* review, the district court examined all the evidence before the bankruptcy court, plus substantial documentary evidence Pierce previously had refused to produce; it also heard live testimony from key witnesses. App. 40, 45-46; SER 8710-13, 8727-29, 11789. In March 2002, the district court affirmed the bankruptcy court's findings and entered judgment for Vickie. App. 39-40, 130; JA 141-42. It found that Howard directed his

lawyers to prepare an *inter vivos* trust for Vickie consisting of half the appreciation of his assets from the date of their marriage. App. 78-85, 87-90, 133-36, 204-05, 215-17. It also found that, to prevent any substantial gift to Vickie, Pierce conspired to suppress or destroy the trust instrument and to strip Howard of his assets by backdating, altering and falsifying documents, arranging for surveillance of Howard and Vickie, and presenting documents to Howard under false pretenses. App. 86-136, 144-46, 202-07, 216-19.

Based on these findings, the court awarded Vickie compensatory damages of approximately $44.3 million.[9] App. 143-44. Additionally, finding "overwhelming" evidence of Pierce's "willfulness, maliciousness, and fraud," it awarded another $44.3 million in punitive damages. App. 145-46.[10]

G. Pierce's Appeal.

Pierce appealed to the United States Court of Appeals for the Ninth Circuit. Vickie cross-appealed the reduction of her compensatory damages and the district court's

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[9] Like the bankruptcy court, the district court found that Howard intended to give Vickie half the increase of his assets from the date of their marriage. App. 137. However, the district court valued the increase for the period ending on the date of Howard's death, while the bankruptcy court valued it for the period ending on the date of trial. App. 137-38. Accordingly, the district court reduced Vickie's compensatory damages even though it found that "the facts are much more egregious than even the bankruptcy court suspected and found." App. 144.

[10] The district court based its findings on the evidence, not on discovery sanctions. App. 46-47. However, it said that if the evidence were judged insufficient to establish an *inter vivos* trust for Vickie, it might deem the trust established as a sanction for Pierce's pervasive discovery abuses. App. 80 n.17; *see* SER 8703-13.

determination that her compulsory counterclaim was non-core. App. 2; SER 11931-33.

The Ninth Circuit reversed the district court's judgment, holding that under the "probate exception," there was no federal subject matter jurisdiction over Vickie's claim. App. 1-38. In so concluding, the court acknowledged:

> The record before us indicates that the district court has neither decided whether the last will and testament of J. Howard Marshall II should be admitted to probate nor whether the dispositive provisions of decedent's 1982 trust, as amended, are valid. The district court did not supervise the administration of the estate of J. Howard Marshall II. . . . [T]his case does not involve the administration of an estate, the probate of a will, or any other purely probate matter. . . .

App. 28.

However, the court said, the probate exception divests federal courts of subject matter jurisdiction over not only these "pure" probate matters, but also over any claim that (1) "interfere[s] with the probate proceedings" by deciding questions "which would ordinarily be decided by a probate court," or (2) has been exclusively "relegated . . . to a special court" by state law. App. 29, 34. The court said both tests were met here. App. 29-37. It also concluded that although courts commonly refer to "'the probate exception *to diversity jurisdiction*,'" the doctrine applies equally to non-diversity cases, including the present bankruptcy case. App. 25-26. Thus, it held that there was no subject matter jurisdiction over Vickie's claim. *Id.*

Vickie filed a timely petition for rehearing and rehearing *en banc*, which was denied February 16, 2005. App. 222.

SUMMARY OF ARGUMENT

> "On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase – however fortuitously coined."

Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074, 2077 (2005).

The "probate exception" is such a rule. This Court has never recognized a "probate exception" to federal jurisdiction – i.e., a blanket jurisdictional bar that is uniquely applicable to probate-related claims.[11] To the contrary, throughout its history, this Court repeatedly has held that there is broad federal jurisdiction over all kinds of probate-related claims, including claims to decedents' estates by heirs, legatees and creditors. In the occasional case where the Court held that there was no jurisdiction over a particular probate-related claim, it did so because a statutory jurisdictional requisite was not met – for example, because the parties were not diverse or because the plaintiff had not pled a case "at common law or in equity" – *not* because a non-statutory subject-matter exception precluded the exercise of federal jurisdiction.

In the late twentieth century, some of the lower federal courts transmogrified this jurisprudence into a single, amorphous, undifferentiated "probate exception" that potentially excludes federal jurisdiction over any claim that concerns a decedent's will or property. As defined by these courts, this "probate exception" is unmoored from its origins and has no discernible limiting principles. As a result, as the Ninth Circuit's opinion here

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[11] This Court has decided many probate-related claims, but it has never used the term "probate exception." That term appears to have been used for the first time in *Magaziner v. Montemuro*, 468 F.2d 782, 787 (3d Cir. 1972), a domestic relations case; it apparently was first used in a probate-related case in *Lee v. Hunt*, 431 F. Supp. 371, 377 (W.D. La. 1977).

illustrates, it is being used to restrict federal jurisdiction in broad and unprecedented ways.

The Court should reject the "probate exception" as a basis for determining federal jurisdiction. Instead, it should follow a single lodestar: Federal jurisdiction should be exercised as fully as the Constitution permits and Congress intended. Under this principle, this Court must conclude that there is federal subject matter jurisdiction in the present case.

First, this Court has recognized federal jurisdiction over all manner of probate-related claims – so long as the normal requisites of federal jurisdiction are met – even including claims seeking interpretation of a will, determination of a decedent's testamentary intent, and allocation of interests in a decedent's estate. The claim at issue here has no such direct relation to probate. Vickie, a debtor in bankruptcy, is suing to recover tort damages against Pierce personally. Her suit does not seek anything from Howard's probate estate, and it neither implicates his testamentary intent nor challenges the validity of his will or trust. Its outcome, thus, could have no possible effect on probate court proceedings – not on the interpretation of Howard's testamentary documents nor on the administration or distribution of his probate estate. Accordingly, this Court's jurisprudence compels the conclusion that federal jurisdiction over Vickie's claim is not defeated by any "probate exception."

Second, the "probate exception," however understood, can have no application in a bankruptcy case. The bankruptcy jurisdiction statute, 28 U.S.C. § 1334, invests federal courts with exclusive *in rem* jurisdiction over all property of the bankruptcy estate, and with concurrent jurisdiction over all bankruptcy-related claims. The sweeping federal jurisdiction conferred by section 1334 and its legislative history refute any notion that Congress intended state courts to have exclusive jurisdiction over

bankruptcy-related probate matters. There is no place for a "probate exception" in this scheme.

Third, the lower federal courts that have rejected this Court's probate jurisprudence have, in one form or another, adopted two tests for applying a "probate exception" to divest the federal courts of jurisdiction; the Ninth Circuit applied both here. Both tests distort the precedents on which they ostensibly are based, rely on jurisdictional analyses that this Court has repudiated and fly in the face of Congress's clearly expressed intent regarding the scope of federal subject matter jurisdiction.

For all of these reasons, there is federal jurisdiction in the present case. Accordingly, we urge this Court to reverse the Ninth Circuit and reinstate the judgment of the district court.

ARGUMENT

I. THERE IS NO "PROBATE EXCEPTION" TO FEDERAL SUBJECT MATTER JURISDICTION OVER AN *INTER PARTES* TORT ACTION.

A. This Court Consistently Has Recognized Broad Federal Jurisdiction Over Probate-Related Claims.

In decisions dating to the early nineteenth century, this Court consistently has recognized broad federal jurisdiction over claims to a decedent's estate by heirs, legatees and creditors. The Court has explained that if federal jurisdiction is otherwise proper, "'A citizen of another State may establish a debt against the estate. . . . In like manner a distributee, citizen of another State, may establish his right to a share in the estate. . . . '" *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 44 (1909) (quoting *Byers v. McAuley*, 149 U.S. 608, 620 (1893)). Similarly,

> whenever a controversy in a suit between ... parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.

Gaines v. Fuentes, 92 U.S. 10, 22 (1876).

Thus, in *McClellan v. Carland*, 217 U.S. 268 (1910), the Court held that there was federal jurisdiction to decide whether the plaintiffs were "the sole heirs at law and next of kin of said decedent, and entitled to inherit the estate, real and personal." *Id.* at 275-76. The Court explained that the suit "was within the original jurisdiction of the circuit court of the United States." *Id.* at 281. Moreover,

> The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction, for both the state and Federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different states the Federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case.

Id. at 282.

Similarly, in *Waterman*, 215 U.S. 33, the Court held there was federal jurisdiction over a claim that a charitable bequest in a decedent's will lapsed and, thus, the plaintiff was entitled to a portion of the decedent's estate. The Court noted that it had

> uniformly maintained the right of Federal courts of chancery to exercise original jurisdiction (the proper diversity of citizenship existing) in favor

> of creditors, legatees and heirs, to establish their claims and have a proper execution of the trust as to them.

Id. at 43. Thus, since the parties were diverse, a federal court "may, and we think it has the right to, determine, as between the parties before the court, the interest of the complainant in the alleged lapsed legacy and residuary estate." *Id.* at 46.

And, in *Payne v. Hook*, 74 U.S. 425 (1868), the Court held that there was federal jurisdiction over the plaintiff's suit to obtain her intestate share of her brother's estate from the estate administrator, who the plaintiff alleged had used the decedent's assets for private gain. According to the Court, it was "well settled" that a federal court "as an incident to its power to enforce trusts, and make those holding a fiduciary relation account, has jurisdiction to compel executors and administrators to account and distribute the assets in their hands." *Id.* at 431.

These cases are consistent with many others in which the Court has held there is federal jurisdiction over suits to: decide claims arising out of purported wills (*Markham v. Allen*, 326 U.S. 490 (1946); *Byers*, 149 U.S. 608; *Hayes v. Pratt*, 147 U.S. 557 (1893); *Gaines*, 92 U.S. 10); determine intestate succession rights (*Byers*, 149 U.S. 608); resolve claims of breach of duty by estate administrators (*Hook v. Payne*, 81 U.S. (14 Wall.) 252 (1871); *Green's Adm'x v. Creighton*, 64 U.S. (23 How.) 90 (1859); and collect debts against estates (*Lawrence v. Nelson*, 143 U.S. 215 (1892)); *Clark v. Bever*, 139 U.S. 96 (1891); *Borer v. Chapman*, 119 U.S. 587 (1887); *Suydam v. Broadnax*, 39 U.S. (14 Pet.) 67 (1840)).

Vickie's tort claim against Pierce for interference with an intended *inter vivos* gift is well within federal jurisdiction as this Court defined it in these prior cases. Indeed, Vickie's claim is much less closely related to probate; while many of these cases involve claims that relate in some way

to a probate estate or its administration, her claim concerns neither. For example, Vickie's claim:

- Can have no effect on the administration or distribution of Howard's probate estate because it is against Pierce individually, not against Howard's estate. JA 23-25; App. 28, 162-63, 166-67.

- Does not challenge the validity of the will or trust that were before the Texas probate court; instead, Vickie's claim asserts that Howard attempted to create a *separate* trust for her that would have existed independently of, and would not have affected the validity of, the will and trust. App. 28, 162-63, 166-67.[12]

- Did not depend on Howard's death, because it asserted interference with a gift Howard intended to make *during his life*. SER 12448; *see also* SER 11788 ("The issue in this case is not [Howard's] testamentary intent, but his donative intent during his lifetime.").

- Does not depend on Pierce receiving assets from Howard's estate; because it is a tortious *interference* claim, it would have existed even if Howard's wealth had been transferred elsewhere. JA 23-25.

Thus, Vickie's claim is well within federal jurisdiction as recognized by this Court.

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[12] The Ninth Circuit suggested that the district court invalidated Howard's trust, App. 28, 30, 33, but it did not do so. Although the district court considered the circumstances surrounding the trust's execution "as evidence to negate Pierce's contention that . . . Howard had no donative intent," SER 11788 n.2, its judgment expressly did not rest on an assertion that the will or trust were invalid, App. 166-67; SER 11788.

B. This Court Historically Has Recognized Only Narrow Limitations On Federal Probate Jurisdiction, Which Do Not Apply Here.

Although the Court has recognized broad federal jurisdiction over probate-related claims, that jurisdiction is not unlimited. Rather, in the nineteenth and early twentieth centuries, this Court held that federal courts lack jurisdiction over probate-related claims if they fail to meet the same statutory requirements that apply to non-probate claims. It also held that a federal court's remedial power (but not its jurisdiction) is limited by a generally-applicable rule of comity that prevents federal courts from seizing property in the custody of other courts. These jurisdictional and remedial limits were held to divest federal courts of jurisdiction over only a narrow category of probate-related claims, and they do not apply here.

1. Statutory diversity limitations.

Since 1789, there has been statutory diversity jurisdiction over "suits of a civil nature at common law or in equity" (later, "civil actions") between "citizens of different states."[13] In its early jurisprudence, this Court identified narrow limitations on jurisdiction over probate-related matters that result from the requirements of the diversity jurisdiction statute.

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[13] The Judiciary Act of 1789 gave federal courts "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State." Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78. The current version of the diversity statute, 28 U.S.C. § 1332, adopted in 1948, gives the district courts "original jurisdiction of all civil actions where the matter . . . is between . . . citizens of different States."

a. The *inter partes* requirement.

Because diversity jurisdiction depends on diverse citizenship *of parties*, this Court has held that it does not extend to actions "which do[] not necessarily involve any controversy between parties." *Gaines v. Fuentes*, 92 U.S. 10, 21 (1876). This Court has said that the "original probate" of a will (*Ellis v. Davis*, 109 U.S. 485, 497 (1883)) – i.e., the preliminary "establishment" of a will as a testamentary document (*Gaines*, 92 U.S. at 21) – does not involve a dispute between parties and, thus, is outside federal diversity jurisdiction.[14] *Gaines*, 92 U.S. at 21; *In re Broderick's Will*, 88 U.S. (21 Wall.) 503, 509 (1874); *Ellis*, 109 U.S. at 497.

In contrast, the Court has said, disputes between parties that arise out of wills are *inter partes* controversies and, thus, are not barred:

> From its nature, and from the want of parties, or the fact that all the world are parties, the [probate] proceeding is not within the designation of cases at law or in equity between parties of different states, of which the Federal courts have concurrent jurisdiction with the State courts under the Judiciary Act; but whenever a controversy in a suit between such parties arises respecting the validity or construction of a will,

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[14] "A will takes its legal validity from its probate; that is, the certification by the court . . . that it has been executed, published, and attested as required by law. . . ." 2 J. G. Woerner & William F. Woerner, *American Law of Administration* § 214, at 701 (3d ed. 1923). "It is no part of the proceeding on probate to construe or interpret the will or any of its provisions, or to distinguish between valid and void, rational and impossible, dispositions; if the will be properly executed and proved, it must be admitted to probate, although it contain not a single provision capable of execution, or valid under the law. Hence the probate does not establish the validity or effect of any of its provisions; that is to be determined by the courts of construction, when any question arises concerning their interposition." *Id.* § 228, at 774-75.

> or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.

Gaines, 92 U.S. at 21-22; *see also Ellis*, 109 U.S. at 497 ("Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties.").

Thus, while this Court has said that there is no federal jurisdiction to "establish" wills, it has routinely adjudicated disputes *between parties* arising out of purported wills. *See, e.g., Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909) (action to determine rights under will); *Byers v. McAuley*, 149 U.S. 608 (1893) (action to invalidate will); *Hayes v. Pratt*, 147 U.S. 557 (1893) (action to determine rights under will); *Gaines*, 92 U.S. 10 (action to annul a will as evidence of title to real property). It has also adjudicated all manner of other *inter partes* claims involving decedents' estates. *See* § I.A, *supra*.

The *inter partes* requirement discussed in these cases does not oust jurisdiction in the present case. Here, the lower federal courts were not asked to probate Howard's will or, indeed, to adjudicate any controversy arising out of it. App. 28, 162-63, 166-67. Rather, they were asked only to decide Vickie's claim that she is entitled to damages *from Pierce* for tortiously interfering with a gift Howard intended to make during his life. App. 28, 162-63, 166-67; SER 11788, 12448. Moreover, and of dispositive significance here, the *inter partes* limitation is a creature of the

diversity statute and has no application to federal bankruptcy jurisdiction, which does not depend on an *inter partes* dispute. *See* § II, *infra*.

b. The diverse party requirement.

Because federal diversity jurisdiction extends only to disputes between citizens of different states, this Court has held that it "can go no further than . . . diverse citizenship extends." *Byers*, 149 U.S. at 618. Accordingly, the Court has said that in diversity cases, federal courts may not administer entire probate estates unless there is complete diversity among all interested parties. *E.g.*, *Byers*, 149 U.S. at 620 ("Federal court erred in . . . attempting to adjudicate the rights of citizens *of the State, as between themselves.*") (emphasis added); *Waterman*, 215 U.S. at 45 (lacking complete diversity, "the bill in this case goes too far in asking to have an accounting of the estate"); *Hook v. Payne*, 81 U.S. (14 Wall.) 252, 255 (1871) ("all that part of the decree which attempts to settle the rights of [non-diverse] parties . . . must be reversed").

Although the diverse party requirement thus precludes wholesale estate administration absent complete diversity among all claimants, it does not bar federal adjudication of disputes between citizens of different states over rights to decedents' estates. *E.g.*, *Byers*, 149 U.S. at 620 (federal court "might entertain jurisdiction in favor of all citizens of other States, to determine and award their shares in the estate"); *Waterman*, 215 U.S. at 46 (federal court "has the right to determine, as between the parties before the court the interest of the complainant in the alleged lapsed legacy and residuary estate"); *Hook*, 81 U.S. at 256 (federal court may exercise jurisdiction over claims to decedent's estate made by diverse parties).

The diverse party requirement does not oust jurisdiction over Vickie's claim, which seeks adjudication of a tort claim *against Pierce individually*, not administration of

Howard's estate. JA 23-25; App. 28, 162-63, 166-67. Moreover, the diverse party requirement should have no application to a claim in bankruptcy, which depends neither on a dispute between parties nor on diversity of citizenship.

c. The common law or equity requirement.

This Court has held that the pre-1948 grant of diversity jurisdiction over suits "at common law or in equity" limited federal equity jurisdiction to that exercised by "the High Court of Chancery in England at the time of the adoption of the Judiciary Act of 1789." *Waterman*, 215 U.S. at 43; *see also McClellan v. Carland*, 217 U.S. 268, 281 (1910) (same).[15] Thus, because in English practice wills of personal property were probated in ecclesiastical courts, not the High Court of Chancery, this Court held that federal equity courts also lacked jurisdiction to establish or annul wills. *In re Broderick's Will*, 88 U.S. at 512 ("the court of chancery will not entertain jurisdiction of questions in relation to the probate or validity of a will which the ecclesiastical court is competent to adjudicate"); *Armstrong v. Lear*, 25 U.S. (12 Wheat.) 169, 175 (1827) ("By the common law, the exclusive right to entertain jurisdiction over wills of personal estate, belongs to the ecclesiastical Courts"); *Gaines*, 92 U.S. at 21 ("by the general jurisdiction of courts of equity . . . a bill will not lie to set aside a will or its probate").

The limitation imposed by exclusive English ecclesiastical jurisdiction was very narrow. By the late eighteenth century, the English ecclesiastical courts had exclusive

[15] Prior to 1938, the federal courts operated as separate courts of law and equity. 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 1004, 1041 (3d ed. 2002). Legatees, heirs and creditors generally sued in the federal equity courts, which offered them broader relief than was available in the law courts.

jurisdiction only over proceedings to establish (i.e., "probate") wills of personal property and to appoint and remove personal representatives. John F. Winkler, *The Probate Jurisdiction Of The Federal Courts*, 14 Prob. L.J. 77, 86-87 (1997); *see also* G.R.Y. Radcliffe & Geoffrey Cross, *The English Legal System* 239 (6th ed. 1977). The common law courts, in contrast, had exclusive jurisdiction over testamentary and intestate transfers of real property, as well as over debt actions against decedents' estates. Winkler, *supra*, at 82, 86; Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. Cal. L. Rev. 1479, 1503-04 (2001); Thomas E. Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 Mo. L. Rev. 107, 113 (1943). The High Court of Chancery had even broader probate jurisdiction; it

> regularly granted a wide variety of relief in [probate-related] proceedings. It gave creditors, heirs, and legatees any relief needed to establish their interests against one another or their decedents' personal representatives. It determined heirs, construed wills, and took whatever actions were needed to distribute a decedent's personal property to the proper parties. It ordered full accountings and disclosures by personal representatives, appointed masters to supervise their estate administration, and assessed personal damages against them for misconduct.

Winkler, *supra*, at 87.

By the eighteenth century, the High Court of Chancery "had become the usual forum for resolving disputes arising during the administration and distribution of decedent's personal property." *Id.*[16] Additionally, "[w]here

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[16] *See also* Theodore F. T. Plucknett, *A Concise History Of The Common Law* 742 (5th ed. 1956) ("Particularly in the sixteenth and

(Continued on following page)

the claim against an estate was purely equitable, as where a testator . . . had devised property in trust . . . the court of chancery had, of course, an original and exclusive jurisdiction." Pomeroy, *supra*, § 156, at 211-12; *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (emphasis added) (citing *Lessee of Smith v. McCann*, 65 U.S. (24 How.) 398, 407 (1861)) (throughout eighteenth century, chancery exercised "*exclusive* jurisdiction over virtually all actions by beneficiaries for breach of trust.") Thus, "chancery would . . . never refuse to adjudicate matters relating to trusts." Nicolas, *supra*, at 1513-14.

Chancery's jurisdiction was unaffected by a parallel proceeding in a church court: "By 1787, at least, it was established that the pendency of suit in the church court was not ground for dismissal of a bill in equity for administration of the same estate." Atkinson, *supra*, at 119; *see also Bissel v. Axtell*, 2 Vern. 47, 23 Eng. Rep. 641 (1688) (ordering administrator to account although he had already done so in the ecclesiastical court); *Howell v. Waldron*, 2 Chan. Cas. 85, 22 Eng. Rep. 858 (1681) (suit by infant legatee allowed to proceed although also pending in church court); *Anon.*, 1 Atk. 491, 26 Eng. Rep. 311 (1738) (chancery court enjoined ecclesiastical suit so claim for legacy could be decided in chancery court).

Consistent with this history, while federal equity courts did not probate wills, they routinely decided claims arising out of wills, *see* § I.A, *supra*, including claims to

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seventeenth centuries, the inadequacy for all practical purposes of the ecclesiastical courts drove litigants into chancery"); 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 346, at 776 (5th ed. 1941) ("the equitable jurisdiction of administrations, though often called concurrent, practically became exclusive"); Radcliffe & Cross, *supra*, at 139 ("interference of the Court of Chancery in the administration of the estates of deceased persons led naturally to another very important branch of the jurisdiction of the court, namely the construction of the wills of personal property").

recover property distributed under wills, *e.g.*, *Gaines*, 92 U.S. at 17, 20 (equity court could "annul the will as a muniment of title"). Additionally, as in England, they routinely exercised jurisdiction over trusts. *E.g.*, *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43 (1909) (noting power of federal equity courts "to exercise original jurisdiction . . . in favor of creditors, legatees and heirs to . . . have a proper execution of the trust as to them"); *Borer v. Chapman*, 119 U.S. 587, 600 (1887) ("It is upon the ground of such a trust that the jurisdiction of courts of equity primarily rests").

Assuming the jurisdiction the ecclesiastical courts once had could somehow continue to limit federal jurisdiction today,[17] that would not preclude jurisdiction over Vickie's claim. Her tort claim for damages against Pierce for interference with a gift would not have been within the exclusive jurisdiction of the ecclesiastical courts at any time. Rather, as a claim seeking a money judgment against Pierce for interfering with a trust, JA 23-25; App.

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[17] The restrictions on federal jurisdiction that resulted from exclusive English ecclesiastical jurisdiction arguably should have no continuing influence. *See*, *e.g.*, *Lloyd v. Loeffler*, 694 F.2d 489, 492 (7th Cir. 1982) ("[I]t would be odd if the jurisdiction of England's ecclesiastical courts, theocratic institutions unlikely to be well regarded in America, should have been thought to define the limits of the jurisdiction of the new federal courts."); *Ashton v. Josephine Bay Paul and C. Michael Paul Found., Inc.*, 918 F.2d 1065, 1071 (2d Cir. 1990) ("Ecclesiastical courts are not part of the American legal tradition, and the drafters of the Judiciary Act may well have viewed chancery's deference to such courts as nothing but a quirk of English legal history."); Nicolas, *supra*, at 1502 ("[I]t is unlikely that the drafters of the 1789 Act would have thought of federal jurisdiction as divided among common law, equity, and ecclesiastical law. Indeed, it is likely that they thought the latter category was subsumed by the former two."); Ralph Brubaker, *Bankruptcy and the Probate Exception to Federal Jurisdiction*, 25 Bankr. Law Letter 1, 5 (March 2005) (characterizing as "extremely curious" any continuing impact of exclusive ecclesiastical jurisdiction).

28, 162-63, 166-67, it would have been within the jurisdiction of the English courts of law or equity.

2. The "*Williams* doctrine."

This Court has applied an additional non-statutory limitation on the power of federal courts to adjudicate probate-related claims: the "*custodia legis*" or "*in gremio legis*" doctrine. In *Williams v. Benedict*, 49 U.S. (8 How.) 107, 112 (1850), this Court held that where a state court has prior possession of a decedent's estate, the estate's assets are "*in gremio legis*" ("under the protection of the law") and, thus, not subject to direct process by a federal court. This doctrine is explicitly remedial, not jurisdictional, however: While it precludes federal courts from "seiz[ing] or control[ling] property . . . in the custody of a court of the state," *Borer v. Chapman*, 119 U.S. 587, 600 (1887), it "*has no application* . . . wherein the plaintiff seeks merely an adjudication of his right . . . as a basis of a claim against a fund in the possession of a state court," *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939) (emphasis added). Thus,

> A citizen of another State may establish a debt against the estate. But the debt thus established must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent. In like manner a distributee, citizen of another State, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties, or against any other parties subject to liability, or in any other way which does not disturb the possession of the property by the state court.

Waterman, 215 U.S. at 44 (citations & internal quotation marks omitted).

The *Williams* doctrine is irrelevant to Vickie's claim, which does not ask the federal courts to "seize" or "control" any property in the custody of a state court. JA 23-25; App. 28, 162-63, 166-67. Rather, Vickie's claim seeks damages against Pierce individually, *id.* – something that the *Williams* doctrine expressly allows. Moreover, and also dispositive here, the *Williams* doctrine does not apply to federal bankruptcy jurisdiction; as explained below, one of the express purposes of the Bankruptcy Code is to give the federal courts exclusive jurisdiction over bankruptcy estate assets, even if the assets are in the custody of another court. *See* note 25, *infra*.

C. The Court's Modern Decisions Demonstrate That There Is Federal Jurisdiction Over This Case.

1. *Markham v. Allen.*

This Court applied the principles articulated in its nineteenth and early twentieth century probate-related decisions most recently in *Markham v. Allen*, 326 U.S. 490 (1946), a federal suit arising out of the death of a California resident who willed property to German citizens. While a state court probate action initiated by the decedent's heirs was pending, the Alien Property Custodian, a federal officer, sued in federal court claiming he, not the heirs, was entitled to the decedent's estate. *Id.*

This Court held there was federal jurisdiction over the Custodian's suit and awarded him the decedent's entire net estate. The Court explained that although a federal court may not "probate a will or administer an estate," it has jurisdiction over "suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate" so long as it does not "disturb or affect the possession of property in the custody of a state court." *Id.* at 494. There, the Court found no such effect: Although the federal judgment awarded the Custodian the decedent's *entire net*

estate, it left "undisturbed the orderly administration of decedent's estate in the state probate court and . . . decree[d] petitioner's right in the property to be distributed after its administration." *Id.* at 495. "This, as our authorities demonstrate, is not an exercise of probate jurisdiction or an interference with property in the possession or custody of a state court." *Id.*

Markham's holding, which recognized broad federal jurisdiction over probate-related suits, is entirely consistent with its predecessors. It demonstrates that there is federal jurisdiction over Vickie's claim, which does not seek to probate a will, administer an estate or disturb the possession of any property in probate court custody. JA 23-25; App. 28, 162-63, 166-67. Indeed, far from awarding Howard's "entire net estate" to Vickie – an outcome that under *Markham* would be well within federal jurisdiction – the federal judgment had *no* effect on Howard's estate. *Id.*

2. The domestic relations exception: *Ankenbrandt v. Richards*.

Since *Markham*, this Court has had no further occasion to discuss the breadth of federal jurisdiction over probate-related matters. However, in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), it ruled that a cognate doctrine, the "domestic relations exception," bars federal jurisdiction over divorce, alimony, or child custody decrees, but allows federal courts to entertain tort actions between diverse parties, even if they arise out of domestic disputes.

Ankenbrandt was a tort action for damages alleging abuse of two children by their father. *Id.* at 691. The district court dismissed for lack of jurisdiction, concluding that "'the whole subject of the domestic relations . . .

belongs to the laws of the States.'" *Id.* at 691-92. This Court reversed, holding federal jurisdiction was proper.[18]

Ankenbrandt compels a similar holding here. *First*, in *Ankenbrandt*, this Court made clear that, whatever its legitimacy or scope, a domestic relations exception to federal jurisdiction does not encompass a tort claim between diverse parties seeking damages. *Ankenbrandt*, 504 U.S. at 704. Here, Vickie's tort claim against Pierce is exactly that: A tort claim for damages that does not involve the probate, administration or distribution of Howard's estate in any way. JA 23-25; App. 28, 162-63, 167.

Second, if an *Ankenbrandt*-type analysis were applied here, it would operate so as to preclude any extension of the limits that this Court has imposed on federal jurisdiction over probate-related matters. In enforcing a domestic relations exception, *Ankenbrandt* considered itself bound by the Court's prior cases recognizing that exception – not because of the reasoning of those precedents, but because Congress had effectively codified those cases:

> We thus are content to rest our conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which it was seemingly based, but rather on Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948, when the statute limited jurisdiction to "suits of a civil nature at common law or in equity." [¶] When Congress amended the diversity statute in

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[18] The Court held that Article III of the Constitution "contains no limitation on subjects of a domestic relations nature." *Id.* at 695. It traced the "domestic relations exception" to early decisions of the Court, which held that there was no federal jurisdiction over divorce or alimony because English equity jurisdiction, on which federal equity jurisdiction was based under the prevailing diversity jurisdiction statute, did not extend to those subjects. *Id.* at 698-99.

> 1948 to replace the law/equity distinction with the phrase "all civil actions," we presume Congress did so with full cognizance of the Court's nearly century-long interpretation of the prior statutes, which had construed the statutory diversity jurisdiction to contain an exception for certain domestic relations matters.

Id. at 700.

Ankenbrandt's approach, if applied here, freezes this Court's prior holdings on jurisdiction over probate-related matters.[19] *Ankenbrandt* thus would exclude from federal jurisdiction only the narrowest band of cases. As we have shown, this Court has held that in some circumstances federal courts cannot probate wills, administer estates or seize property in the custody of other courts, but it has never recognized any other limitations on federal probate jurisdiction. To the contrary, it repeatedly has exercised broad jurisdiction over probate-related claims. *See* §§ I.A-I.C.1, *supra*. As applied to probate-related cases, therefore, *Ankenbrandt* demonstrates that any "probate exception" cannot bar federal jurisdiction over an *inter partes* tort action like the present one, which does not seek to probate a will, to administer a decedent's estate or to interfere with any property in the custody of another court. JA 23-25; App. 162-63, 166-67.

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[19] *Ankenbrandt's* approach is somewhat different than the approaches of the Court's earlier probate-related cases: While those cases recognized only limitations that could be traced to specific statutory provisions or to the *Williams* doctrine, *Ankenbrandt* held that additional limitations could be engrafted onto the statutes through Congressional silence. Under *Ankenbrandt's* approach, however, those additional limitations can be no broader than those this Court identified in prior cases.

D. This Court Should Reject The Concept Of A "Probate Exception" And Reaffirm Broad Federal Jurisdiction Over Probate-Related Claims.

In the sixty years since *Markham v. Allen*, many of the lower federal courts have hewn closely to its analysis, holding that there is broad federal jurisdiction over probate-related claims. Petition for Certiorari ("Pet. Cert.") 12-14. Others, however, while purporting to follow *Markham*, have lost sight of the origins of this Court's discrete limits on federal jurisdiction over probate-related claims and – as we discuss more fully in Section III, *infra* – merged them into a single, amorphous "probate exception" that divests federal courts of jurisdiction over any suit that potentially concerns a decedent's will or property in any way. *Id.* at 14-18.[20] Thus, these lower courts have posited a wide-ranging, non-statutory bar to claims based solely on their subject matter.

This Court should reject entirely the concept of a "probate exception." As this Court has held, "*Only Congress* may determine a lower federal court's subject-matter jurisdiction." *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004)

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[20] Many of these courts apparently believed that the probate exception is a judicially-created doctrine that, accordingly, cannot be defined with reference to statute. *E.g.*, *Lepard v. NBD Bank*, 384 F.3d 232, 237 (6th Cir. 2004) (" 'Under the so-called "probate exception," even when the requirements of diversity jurisdiction have been met . . . a federal court nonetheless lacks jurisdiction over cases involving probate matters.' "); *Storm v. Storm*, 328 F.3d 941, 944 (7th Cir. 2003) (discussing "practical bases" for applying "judicially created" probate exception); *Sianis v. Jensen*, 294 F.3d 994, 997 (8th Cir. 2002) ("The probate exception is a judicially-created limitation on federal court subject matter jurisdiction, which prohibits the exercise of jurisdiction even where . . . all the prerequisites for diversity jurisdiction are otherwise present."); *Bedo v. McGuire*, 767 F.2d 305, 307 (6th Cir. 1985) ("The boundaries of the judicially created probate exception to federal diversity jurisdiction are quite imprecise.").

(citing U.S. Const., Art. III, § 1) (emphasis added). Thus, this Court should reaffirm its long-standing jurisprudence in which federal jurisdiction over probate-related claims – as over all claims – is defined by the jurisdictional statutes Congress enacted. As in the present case, therefore, where a dispute arises between parties and federal jurisdiction is otherwise proper, "there is no more reason why the Federal courts should not take jurisdiction of [a probate-related] case than there is that they should not take jurisdiction of any other controversy between the parties." *Gaines v. Fuentes*, 92 U.S. 10, 21-22 (1876).

II. THERE IS NO "PROBATE EXCEPTION" TO FEDERAL BANKRUPTCY JURISDICTION.

The preceding section demonstrates that this Court's prior cases provide no basis for declining jurisdiction over Vickie's *inter partes* tort claim against Pierce. But there is another, independent reason why federal jurisdiction exists here: A "probate exception," however understood, can have no application to a case like this one that properly invokes federal bankruptcy jurisdiction.

Because only Congress can define a lower federal court's subject matter jurisdiction, *Kontrick v. Ryan*, 540 U.S. at 452, a "probate exception" can apply in bankruptcy only if Congress so intended. In determining whether federal subject matter jurisdiction exists, thus, this Court's "task is to construe what Congress has enacted." *Duncan v. Walker*, 533 U.S. 167, 172 (2001); *accord Ankenbrandt*, 504 U.S. at 698.

The Ninth Circuit in the present case never analyzed the bankruptcy jurisdiction statute, 28 U.S.C. § 1334 ("section 1334"). *See* App. 25-26. As we now demonstrate, the plain language and legislative history of section 1334 show that Congress unqualifiedly did not intend a "probate exception" to federal bankruptcy jurisdiction. Rather, section 1334's plain language and legislative history show

that Congress intended to confer broad federal jurisdiction over *all* bankruptcy-related claims and to address any state comity concerns through non-jurisdictional, statutory abstention provisions.

A. The Plain Language And Legislative History Of 28 U.S.C. § 1334 Demonstrate That Congress Invested The Federal Courts With Jurisdiction Over All Bankruptcy Claims And Intended No "Probate Exception" To That Comprehensive Jurisdictional Grant.

Section 1334 invests the federal courts with exclusive jurisdiction over all cases "under" the Bankruptcy Code (Title 11 of the United States Code), and nonexclusive jurisdiction of all civil proceedings "arising under" the Bankruptcy Code or "arising in or related to" cases under the Bankruptcy Code. 28 U.S.C. § 1334(a)-(b). It also invests federal courts with exclusive jurisdiction over "all the property, wherever located, of the debtor as of the commencement of [a bankruptcy] case, and of property of the estate." 28 U.S.C. § 1334(e). Such property includes "all legal or equitable interests of the debtor in property as of the commencement of the case," 11 U.S.C. § 541(a)(1), including the debtor's claims against third parties, *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995); H.R. Rep. No. 95-595, at 367 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6323; S. Rep. No. 95-989, at 82 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5868.[21]

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[21] There is no dispute that Vickie's claim against Pierce falls within section 1334's express terms. Her claim was a mandatory counterclaim to the proof of claim and complaint to determine dischargeability of debt that Pierce filed in the bankruptcy case, App. 197-98; JA 39; SER 8702; it was her primary asset for satisfaction of creditor claims, SER 6075, 6086; and, at a minimum, it "related to" the bankruptcy because it was a "cause of action owned by the debtor which became property of the estate pursuant to 11 U.S.C. § 541," *Celotex*, 514 U.S. at 307 n.5.

Section 1334's plain language thus shows that Congress intended to provide federal courts with complete jurisdiction over all bankruptcy-related claims. This plain language – which is facially inconsistent with a probate exception – must be "'give[n] effect according to its terms'" unless an implied exception is necessary "to prevent 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole." *United States v. Rutherford*, 442 U.S. 544, 551 (1979). Here, far from being necessary to prevent absurd results, an implied probate exception would directly *contravene* Congress's intent to invest federal courts with broad jurisdiction to determine all bankruptcy-related claims.

Section 1334 was part of a Congressional overhaul of the bankruptcy law in 1978 and 1984 that significantly expanded federal bankruptcy jurisdiction.[22] It was "a distinct departure from" the limited bankruptcy jurisdiction conferred under prior bankruptcy acts. *Celotex*, 514 U.S. at 308; *accord United States v. Whiting Pools*, 462 U.S. 198, 206 n.13 (1983). Those jurisdictional limits had spawned costly jurisdictional disputes and forced parties to splinter bankruptcy-related claims among multiple state and federal forums. *See* H.R. Rep. No. 95-595, at 43-52, *as reprinted in* 1978 U.S.C.C.A.N. at 6004-13; 1 Alan N. Resnick, et al., *Collier On Bankruptcy*, ¶ 1.06, at 1-60–1-68

[22] Section 1334 derived from section 1471 of the Bankruptcy Reform Act of 1978 ("1978 Act"). In *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), this Court held that the 1978 Act was unconstitutional because it gave Article III-type powers to bankruptcy judges who lacked life tenure. In response, Congress enacted the Federal Judgeship Act of 1984 ("1984 Amendments"), which maintained the 1978 Act's comprehensive grant of federal bankruptcy jurisdiction, but allocated that jurisdiction between district courts and bankruptcy courts in a constitutionally permissible way. *See* 28 U.S.C. §§ 157, 1334.

(15th ed. 2005).[23] Congress enacted section 1334 to curtail these jurisdictional disputes by substantially enlarging the bankruptcy jurisdiction of federal courts so that "[a]ctions that formerly had to be tried in State court . . . at great cost and delay to the estate, may now be tried in the bankruptcy courts." H.R. Rep. No. 95-595, at 445-46, *as reprinted in* 1978 U.S.C.C.A.N. at 6400-01; *accord* S. Rep. No. 95-989, at 153, *as reprinted in* 1978 U.S.C.C.A.N. at 5939.[24]

To accomplish its goal, Congress provided "broad and complete [federal bankruptcy] jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases," including "proceedings to which the debtor is a party if the outcome of the proceedings will have an

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[23] The legislative history of the 1978 Act is authoritative with regard to section 1334 because although the 1984 Amendment redistributed federal bankruptcy power between the bankruptcy and district courts, it did not change the scope of federal bankruptcy jurisdiction. *Wood v. Wood (In re Wood)*, 825 F.2d 90, 92-93 (5th Cir. 1987) ("it seems plain that Congress intended no change in the scope of jurisdiction set forth in the 1978 Act when it later enacted section 1334 of the 1984 Act"; thus, "legislative history and judicial interpretations of th[e] [1978] Act . . . are instructive" in interpreting section 1334); *Nat'l City Bank v. Coopers & Lybrand*, 802 F.2d 990, 993 (8th Cir. 1986) (same); *Celotex*, 514 U.S. at 308 (plurality opinion discussing 1978 Act's legislative history when discussing congressional intent for section 1334(b)).

[24] *See, e.g.*, S. Rep. No. 95-989, at 17 ("[a] major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current [law]") *as reprinted in* 1978 U.S.C.C.A.N. at 5803; H.R. Rep. No. 95-595, at 46 ("[a] comprehensive grant of jurisdiction . . . would greatly diminish the basis for litigation of jurisdictional issues which consumes so much time, money, and energy of the bankruptcy system"), *as reprinted in* 1978 U.S.C.C.A.N. at 6007; H.R. Rep. No. 95-595, at 49 (1978 Act intended to eliminate litigation over jurisdiction that has "plagued the bankruptcy system"), *as reprinted in* 1978 U.S.C.C.A.N. at 6010; H.R. Rep. No. 95-595, at 43 ("the delay attendant upon litigation over jurisdiction is needless and expensive"), *as reprinted in* 1978 U.S.C.C.A.N. at 6004.

impact on the case." H.R. Rep. No. 95-595, at 48-49, *as reprinted in* 1978 U.S.C.C.A.N. at 6010; *accord* H.R. Rep. No. 95-595, at 47-48 (Congress intended to "confer jurisdiction over all litigation having a significant connection with bankruptcy"), *as reprinted in* 1978 U.S.C.C.A.N. at 6009. In other words, Congress conferred "the *broadest* grant of jurisdiction to dispose of proceedings that arise in bankruptcy cases or under the bankruptcy code," including both "*in personam* jurisdiction as well as *in rem* jurisdiction to handle everything that arises. . . ." H.R. Rep. No. 95-595, at 445 (emphasis added), *as reprinted in* 1978 U.S.C.C.A.N. at 6400. Congress believed that "the combination of the three bases for jurisdiction, 'arising under title 11,' 'arising under a case under title 11,' and 'related to a case under title 11,' will leave no doubt as to the scope of the bankruptcy court's jurisdiction over disputes." *Id.* at 445-46, *as reprinted in* 1978 U.S.C.C.A.N. at 6401; *accord* S. Rep. No. 95-989, at 154, *as reprinted in* 1978 U.S.C.C.A.N. at 5940.

In short, as this Court has recognized, section 1334's plain language and legislative history demonstrate that Congress gave the federal courts "'comprehensive jurisdiction . . . so that they might deal efficiently and expeditiously with *all matters* connected with the bankruptcy estate.'" *Celotex*, 514 U.S. at 308 (emphasis added). Section 1334(b) therefore "authorizes a district court to exercise concurrent jurisdiction over certain bankruptcy-related civil proceedings that would otherwise be subject to the exclusive jurisdiction of another court." *Bd. of Governors v. McCorp Fin.*, 502 U.S. 32, 41 (1991). And, section 1334(e) invests the district court with exclusive *in rem* jurisdiction over the property of the bankruptcy estate. *Tenn. Student Assistance Corp. v. Hood*, 541 U.S.

440, 448 (2004); *In re White*, 851 F.2d 170, 172-74 (6th Cir. 1988).[25]

Section 1334's plain language and legislative history, thus, refute any notion that Congress intended, through an implied "probate exception," to give state courts exclusive jurisdiction over probate-related claims that impact bankruptcy cases.

B. The Legislative History Of The Bankruptcy Code Shows That Congress Intended Federal Courts To Have Jurisdiction Over Assets Common To Bankruptcy And Probate Estates.

As demonstrated above, a "probate exception" to section 1334 is inconsistent with Congress's clearly-expressed intent to invest federal courts with sweeping jurisdiction over bankruptcy-related claims. In itself, that

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[25] The exclusive *in rem* jurisdiction conferred by section 1334(e) makes the *Williams* doctrine, *see* § I.B.2, *supra*, inapplicable to bankruptcy cases. As the Sixth Circuit has explained: "[T]he 1978 and 1984 changes to the Bankruptcy Code were primarily aimed at getting away from the kind of *in rem* jurisdiction set out in [cases applying the *Williams* doctrine]. The jurisdiction granted [in now section 1334(e)] indicates a conscious effort by Congress to grant the bankruptcy court special jurisdiction and to preclude the type of jurisdictional disputes evidenced in those cases." *In re White*, 851 F.2d at 172-73. Federal courts therefore have exclusive *in rem* jurisdiction over property of the bankruptcy estate even where state courts previously acquired *in rem* jurisdiction over that property in pre-petition proceedings. *See, e.g., id.* at 173 (bankruptcy court had *in rem* jurisdiction over marital property even though state divorce court was "first court to exercise control over the property"); *In re Modern Boats*, 775 F.2d 619, 620 (5th Cir. 1985) (admiralty court's "previous acquisition of *in rem* jurisdiction . . . did not defeat the bankruptcy court's jurisdiction"); *In re French*, 139 B.R. 476, 482 (Bankr. D.S.D. 1992) ("[t]he amendments to the Bankruptcy Code . . . , coupled with the legislative history, clearly indicate that the bankruptcy court had jurisdiction over such matters as a pending divorce even when the state divorce court had in rem jurisdiction first").

fact precludes a "probate exception" to federal bankruptcy jurisdiction. But the legislative history is even more conclusive, as it shows Congress specifically rejected the notion that a probate court should have exclusive jurisdiction over property common to a bankruptcy estate and a probate estate.

The legislative history demonstrates that when Congress enacted the 1978 Act, it expressly contemplated that a debtor's death would give rise to a probate estate that might compete for bankruptcy estate assets. In that circumstance, the *bankruptcy court*, not the probate court, would have jurisdiction over any potentially common assets and claims to those assets:

> Once the [bankruptcy] estate is created, no interests in property of the estate remain in the debtor. Consequently, if the debtor dies during the case, only property exempted from property of the estate or acquired by the debtor after the commencement of the case and not included as property of the estate will be available to the representative of the debtor's probate estate. The bankruptcy proceeding will continue in rem with respect to the property of the [es]tate, and the discharge will apply in personam to relieve the debtor, and thus his probate representative, of liability for dischargeable debts.

H.R. Rep. No. 95-595, at 368, *as reprinted in* 1978 U.S.C.C.A.N. at 6324; S. Rep. No. 95-989, at 83, *as reprinted in* 1978 U.S.C.C.A.N. at 5869.[26]

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[26] Bankruptcy Rule 1016 "carries out this congressional intent. . . ." 9 Alan N. Resnick, et al., *Collier On Bankruptcy* ¶ 1016.02 (15th ed. 2005). It provides that: (a) in cases under chapter 7, a debtor's death "shall not abate" the bankruptcy proceeding and "the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death . . . had not occurred"; and (b) in cases under chapters 11, 12 or 13, if upon a debtor's death "further administration is possible and in the

(Continued on following page)

Congress expressed a similar understanding elsewhere in the legislative history, where it clarified that a debtor could be discharged from his debts *even after his death*: "[I]f the debtor dies during the bankruptcy case, he will nevertheless be released from his debts, and his estate will not be liable for them. Creditors will be entitled to only one satisfaction – from the bankruptcy estate and not from the probate estate." H.R. Rep. No. 95-595, at 384, *as reprinted in* 1978 U.S.C.C.A.N. at 6340; S. Rep. No. 95-989, at 98, *as reprinted in* 1978 U.S.C.C.A.N. at 5884.

Congress could not have reached these conclusions if it had intended state courts to have exclusive jurisdiction over issues and assets common to bankruptcy and probate proceedings. Rather, the legislative history shows that Congress anticipated competing claims for property in federal bankruptcy and state probate proceedings, and intended that in those circumstances federal jurisdiction would be paramount. That intent is irreconcilable with a "probate exception" to bankruptcy jurisdiction.

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best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the d th or incompetency had not occurred." Fed. R. Bankr. P. 1016. Through Rule 1016, thus, even after a debtor's death, the federal courts retain exclusive jurisdiction over the property of the bankruptcy estate and any claims regarding that property. *E.g.*, *In re Lucio*, 251 B.R. 705, 710 (Bankr. W.D. Tex. 2000) (upon a bankruptcy debtor's death, "[t]he probate estate has no authority to supervene the bankruptcy trustee's exclusive control over property of the bankruptcy estate. . . . Neither can the probate estate entertain collateral attacks on the claims allowance process."); *Querner v. Querner* (*In re Querner*), 7 F.3d 1199, 1201 (5th Cir. 1993) (bankruptcy court "had discretion under Bankruptcy Rule 1016 to continue the Chapter 13 case after the death of the debtor, and it had exclusive jurisdiction over the debtor's property during the pendency of those proceedings"). A probate exception to bankruptcy jurisdiction would effectively abrogate this rule.

C. Section 1334's Abstention Provisions Are Further Evidence That Congress Did Not Intend A "Probate Exception" To Federal Bankruptcy Jurisdiction.

The conclusion that Congress did not intend a "probate exception" to federal bankruptcy jurisdiction is reinforced by the abstention provisions of section 1334(c). They demonstrate that instead of restricting the broad bankruptcy jurisdiction conferred by sections 1334(a), (b) and (e), Congress chose to address federal-state comity concerns through non-jurisdictional statutory abstention provisions.

Under section 1334(c)(1), a federal court *may* abstain from deciding any claim "arising under title 11 or arising in or related to a case under title 11" if "in the interest of justice" or "in the interest of comity with State courts or respect for State law." 28 U.S.C. § 1334(c)(1). Under section 1334(c)(2), upon a timely motion, a federal court *shall* abstain from hearing a claim "related to a case under title 11" if there is no separate basis for federal jurisdiction and the claim is "based upon a State law claim or State law cause of action" and "can be timely adjudicated . . . in a State forum of appropriate jurisdiction." 28 U.S.C. § 1334(c)(2).

The plain language of section 1334(c)'s abstention provisions "demonstrate the intent of Congress that concerns of comity and judicial convenience should be met, not by rigid limitations on the jurisdiction of federal courts, but by the discretionary exercise of abstention when appropriate in a particular case." *Wood*, 825 F.2d at 93. "'Congress wisely chose a broad jurisdictional grant and a broad abstention doctrine over a narrower jurisdictional grant so that the district court could determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of bankruptcy

cases.'" *Luker v. Reeves* (*In re Reeves*), 65 F.3d 670, 675 (8th Cir. 2005).

Through the plain language of section 1334, Congress provided federal courts with a mechanism to avoid deciding state law issues that might be more appropriately litigated in state courts. That mechanism is not a jurisdictional exception, but rather carefully drawn provisions that give federal courts jurisdiction over bankruptcy-related state law issues – including issues related to probate and domestic relations[27] – but permit them to abstain from exercising their jurisdiction where appropriate.[28]

In sum, there is no legitimate basis to imply a "probate exception" into section 1334. Far from being "essential to prevent 'absurd results' or consequences obviously

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[27] *See, e.g., Salisbury v. Ameritrust Tex., N.A.* (*In re Bishop College*), 151 B.R. 394, 395 & fn. 1 (Bankr. N.D. Tex. 1993) (bankruptcy court exercised discretion to interpret will and determine whether assets of charitable trusts were debtor's property); *Carter v. Lummis* (*In re Tom Carter Enters.*), 44 B.R. 605, 610 (C.D. Cal. 1984) (district court denied abstention motion based on Nevada probate proceedings); *Weinberg v. Boyle* (*In re Weinberg*), 153 B.R. 286, 294-95 (Bankr. D.S.D. 1993) (court exercised discretion to resolve domestic relations issue related to bankruptcy case); *In re Becker*, 136 B.R. 113, 119-20 (Bankr. D.N.J. 1992) (same); *In re Ziets*, 79 B.R. 222, 226-27 (Bankr. E.D. Pa. 1987) (same); *compare In re French*, 139 B.R. at 482-83 (bankruptcy court recognized it had jurisdiction under section 1334 to determine divorce issues, but exercised discretion to abstain and remand matter to state divorce court).

[28] Abstention under section 1334(c) is not an issue in the present case. The bankruptcy court found that there was an insufficient basis for abstention under section 1334(c)(1) and that Pierce's motion under section 1334(c)(2) was untimely. App. 196. The district court affirmed those rulings and also independently elected to hear Vickie's claim. SER 8593-99. The section 1334(c)(1) rulings were not appealable, 28 U.S.C. § 1334(d); the section 1334(c)(2) rulings were appealable, but Pierce abandoned the issue by failing to raise it in the Ninth Circuit. *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001); *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929-30 (9th Cir. 2003).

at variance with the policy of [section 1334]," *United States v. Rutherford*, 442 U.S. 544, 552 (1979), an implied probate exception would directly undermine Congress's intent to confer federal bankruptcy jurisdiction over all bankruptcy-related claims.

III. THIS COURT SHOULD REJECT THE "PROBATE EXCEPTION" POSITED BY THE NINTH CIRCUIT AND OTHER LOWER FEDERAL COURTS.

As we have demonstrated, there is no statutory justification for a "probate exception" that divests federal courts of subject matter jurisdiction over probate-related claims, particularly those that arise in a bankruptcy action. For that reason alone, the "probate exception" posited by the Ninth Circuit and other courts should be rejected. *See* §§ I, II, *supra*. There is another reason for rejecting the Ninth Circuit's analysis, however: As we now show, the specific tests it adopted distort the precedents on which they ostensibly are based and rely on approaches to jurisdiction that this Court explicitly has rejected.

A. The Interference Test.

1. The interference test is fundamentally inconsistent with *Markham*, on which it ostensibly is based.

In concluding that the probate exception ousts federal jurisdiction over Vickie's claim, the Ninth Circuit embraced a two-part test. The first prong adopted the analysis of the First and Third Circuits, as well as one panel of the Second Circuit, under which a federal court lacks jurisdiction to "interfere with the probate proceedings." App. 28; *see also* App. 31, 33. A court "interfere[s]" when it decides issues that "would ordinarily be decided by a

probate court" or makes findings "in direct and irreconcilable conflict with" a probate court judgment, thus giving a claimant "a second chance to litigate her claim against the estate." App. 28, 30, 32-33.[29]

The ostensible root of the "interference" analysis is *Markham v. Allen*, in which the Court held that federal courts may "entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate" so long as they do not "*interfere with* the probate proceedings." *Markham v. Allen*, 326 U.S. 490, 494 (1946) (emphasis added). The "interference" *Markham* cautioned against, however, manifestly was *not* federal adjudication of rights to a decedent's estate. *Id.* at 494-95. To the contrary, *Markham* held that a federal court "*may* exercise its jurisdiction to adjudicate rights in [estate] property," even if a state probate action is pending and a federal judgment will bind a state court. *Id.* (emphasis added). Thus, while the "interference" analysis adopts *Markham*'s language, it turns the case on its head.

2. The interference test conflates preclusion and jurisdiction.

In addition to being fundamentally inconsistent with *Markham*, the "interference" test makes a fundamental analytic error – conflating *res judicata* and jurisdiction – that this Court recently disapproved in *Exxon Mobil Corp.*

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[29] *Accord Mangieri v. Mangieri*, 226 F.3d 1, 2-3 (1st Cir. 2000) (claim is barred by the probate exception if it is "within the jurisdiction of the [probate court]" or "would require the district court to set aside the ruling of the probate court"); *Moser v. Pollin*, 294 F.3d 335, 340-43 (2d Cir. 2002) (claim held barred by the probate exception because it interferes with probate by "predetermin[ing] the result to be reached by" the probate court); *Golden v. Golden*, 382 F.3d 348, 358 (3d Cir. 2004) ("permitting an action that seeks . . . to assail or contradict a judgment of the probate court generally constitutes impermissible interference with the probate").

v. Saudi Basic Indus. Corp., 125 S. Ct. 1517 (2005). There, the lower court had held that under the *Rooker-Feldman* doctrine, there was no federal jurisdiction over the petitioner's claims because they "'have already been litigated in state court.'" *Id.* at 1525. This Court reversed, holding that properly invoked concurrent jurisdiction does not "vanish[] if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court." *Id.* at 1527. The Court explained:

> Disposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law. . . . *Preclusion, of course, is not a jurisdictional matter.* In parallel litigation, a federal court may be bound to recognize the claim- and issue-preclusive effects of a state-court judgment, but federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court.

Id. (emphasis added) (citations omitted).

The Court emphasized that the federal statutory scheme permits concurrent state and federal adjudication of claims and, thus, "'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Id.* at 1526-27 (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). Rather, "If a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.'" *Id.* at 1527.

Applying these principles here leads unalterably to the conclusion that the probate court's adjudication of Vickie's claim could not deprive the federal courts of jurisdiction because a pending state court action "'is no bar to proceedings concerning the same matter in the Federal court.'" *Id.* at 1526-27. Entry of judgment in Texas

is also irrelevant to federal jurisdiction; while such a judgment may be preclusive, federal jurisdiction nonetheless exists because "[p]reclusion . . . is not a jurisdictional matter." *Id.* at 1527.[30]

B. The State Law Test.

1. The state law test violates this Court's repeated holding that federal probate jurisdiction does not depend on state law.

The second prong of the Ninth Circuit's probate exception analysis is the test of the Fourth, Sixth, Eighth

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[30] A central vice of misidentifying "preclusion" as "jurisdiction" is that it permits a court, as the Ninth Circuit did here, to avoid the requisite preclusion analysis. App. 37 ("[W]e need not address E. Pierce Marshall's arguments concerning claim and issue preclusion."). Texas issue preclusion law bars relitigation only of issues that were "actually litigated," "essential to the prior judgment" and "identical to an issue in a pending action." *Texas Dep't of Public Safety v. Petta*, 44 S.W.3d 575, 579 (Tex. 2001); *see also Price v. Texas Employers' Ins. Ass'n*, 782 S.W.2d 938, 940 (Tex. App. 1989) (to collaterally estop, "identical" issue must have been "actually litigated," "finally . . . determined on the merits" and "necessary, essential and material to the outcome of the prior action"). Texas claim preclusion law bars relitigation only of claims that were "finally adjudicated" or were "compulsory" counterclaims in a prior proceeding. *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 206-07 (Tex. 1999). A counterclaim is not compulsory if it is "the subject of a pending action" at the time of pleading. *Id.* at 207. The Ninth Circuit never considered whether these factors were met; thus, it ignored facts critically relevant to a preclusion analysis, such as: the bankruptcy court judgment preceded the probate court judgment by nearly a year, App. 17, 19; JA 45, 106; Vickie's claim against Pierce was never litigated to final judgment in the probate court, ER 2863; SER 8426-27, 12453; the only question the Texas jury considered concerning Vickie was whether Howard contracted to give her half his property – which both lower federal courts found irrelevant to Vickie's tortious interference claim, JA 93; SER 6624, 12261, 12453; and Vickie's claim against Pierce was not a compulsory counterclaim in Texas because it was pending in the bankruptcy court years before she joined the Texas will contest, JA 23-25; ER 1319; SER 6757, 12260, 12453; *see also* SER 10600-11.

and Tenth Circuits. Those circuits have held that there is no federal jurisdiction over any suit that, under state law, is within the exclusive jurisdiction of state probate courts. In these circuits:

> The standard for determining whether federal jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court. If so, the parties will be relegated to that court. . . .

Rienhardt v. Kelly, 164 F.3d 1296, 1300 (10th Cir. 1999) (emphasis omitted) (citing *McKibben v. Chubb*, 840 F.2d 1525, 1529 (10th Cir. 1988)).[31]

The Ninth Circuit adopted this "state law" approach in the present case:

> Where a state has relegated jurisdiction over probate matters to a special court and if that state's trial courts of general jurisdiction do not have jurisdiction to hear probate matters, then the federal courts also lack jurisdiction over probate matters.

App. 34.

The Ninth Circuit held, moreover, that there are virtually no limits to the matters over which a state may deprive federal courts of jurisdiction:

> The probate jurisdiction extends to all probate matters whether based on a theory of tax liability, debt, gift, bequest, tort, or any other theory that interferes with the probate of wills or the

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[31] *Accord Turja v. Turja*, 118 F.3d 1006, 1009 (4th Cir. 1997); *Lepard v. NBD Bank*, 384 F.3d 232, 237-38 (6th Cir. 2004); *Bedo v. McGuire*, 767 F.2d 305, 305-07 (6th Cir. 1985); *Sianis v. Jensen*, 294 F.3d 994, 998 (8th Cir. 2002); *Beren v. Ropfogel*, 24 F.3d 1226, 1228 (10th Cir. 1994).

> state court's ability to engage in the administration of estates.

Id.

This approach – under which state probate laws dictate the scope of federal jurisdiction – has been repeatedly rejected by this Court. This Court has said:

> We have repeatedly held "that the jurisdiction of the courts of the United States over controversies between citizens of different States, cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."

Payne v. Hook, 74 U.S. 425, 430 (1868). Similarly:

> [I]nasmuch as the jurisdiction of the courts of the United States is derived from the Federal Constitution and statutes, that in so far as controversies between citizens of different States arise which are within the established equity jurisdiction of the Federal courts ... the jurisdiction may be exercised, *and is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters.*

Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43 (1909).[32]

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[32] *Accord McClellan v. Carland*, 217 U.S. 268, 281 (1910) (constitutional and statutory grants of federal jurisdiction cannot "be impaired by subsequent state legislation creating courts of probate"); *Hayes v. Pratt*, 147 U.S. 557, 570 (1893) (state probate statutes cannot "defeat or impair the general equity jurisdiction of the Circuit Court of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction"); *Lawrence v. Nelson*, 143 U.S. 215, 223-24 (1892) (same); *Clark v. Bever*, 139 U.S. 96, 102 (1891) (states cannot preclude federal jurisdiction by assigning exclusive jurisdiction over probate-related claims to its courts, because "no such

(Continued on following page)

This Court's precedents, thus, hold that because federal jurisdiction is created by federal statute, it cannot be impaired by state law. These precedents are fundamentally inconsistent with the approach of the Ninth Circuit and other federal courts of appeals, which makes the scope of federal jurisdiction entirely dependent on state legislative choices concerning the internal organization of state courts.

2. The state law test is fundamentally inconsistent with the precedents on which it ostensibly is based.

The "state law" test apparently originates in two decisions of this Court, *Sutton v. English*, 246 U.S. 199 (1918) ("*Sutton*") and *O'Callaghan v. O'Brien*, 199 U.S. 89 (1905) ("*O'Callaghan*").[33] *Sutton* and *O'Callaghan* were disputes between heirs and legatees in which the latter sought to annul wills already admitted to probate in state courts. Both cases held that federal courts have jurisdiction over "questions relating to the interests of heirs, devisees, or legatees," but they ordinarily cannot "set aside a will or the probate thereof" because "matters of this character are not within the ordinary equity jurisdiction of the federal courts." *Sutton*, 246 U.S. at 205; *see also*

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result can be constitutionally effected."); *Borer v. Chapman*, 119 U.S. 587, 600 (1887) (federal jurisdiction "cannot be affected by any legislation except that of the United States"); *Hess v. Reynolds*, 113 U.S. 73, 77 (1885) ("[The] jurisdiction of the courts of the United States . . . cannot be ousted or annulled by statutes of the States, assuming to confer it exclusively on their own courts."); *Barrow v. Hunton*, 99 U.S. 80, 85 (1879) (same); *Green's Adm'x v. Creighton*, 64 U.S. (23 How.) 90, 107-08 (1859) (same).

[33] *E.g.*, *Bedo*, 767 F.2d at 307; *Erwin v. Barrow*, 217 F.2d 522, 524 (10th Cir. 1954); *Ferguson v. Patterson*, 191 F.2d 584, 586 (10th Cir. 1951).

O'Callaghan, 199 U.S. at 110 ("as . . . the requirement of probate is but a regulation to make a will effective, matters of pure probate . . . are not within the jurisdiction of the courts of the United States"). Nonetheless, in both cases this Court said that states can *expand* federal jurisdiction to include claims to set aside wills or probate by permitting state equity or law courts to hear those claims. *Sutton*, 246 U.S. at 205 ("where a State . . . gives to parties interested the right to bring an action or suit *inter partes*, either at law or in equity, to annul a will or set aside the probate, the courts of the United States . . . can enforce the same remedy"); *O'Callaghan*, 199 U.S. at 110 (same); *see also In re Broderick's Will*, 88 U.S. (21 Wall.) 503, 520 (1874) ("an enlargement of equitable rights may be administered by the Circuit Courts, as well as by the courts of the State").

Sutton and *O'Callaghan*, thus, expressly permit states to *expand* federal jurisdiction, but not to *shrink* it. Interpreting *Sutton* and *O'Callaghan* as the Ninth Circuit and other courts have done – to allow state law to expand *or contract* federal jurisdiction – is thus simply wrong. It also creates profoundly troubling results. Under the Supremacy Clause, "if there is any conflict between federal and state law, federal law shall prevail." *Gonzales v. Raich*, 125 S. Ct. 2195, 2212 (2005); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause . . . '"any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."'"). The state law test reaches precisely the opposite conclusion: It holds that in the event of a conflict between federal jurisdictional statues and state probate laws, the *federal* laws yield.

The affront to federal jurisdiction engendered by the state law test in an ordinary case was magnified here because the Ninth Circuit held that the district court could

not independently determine its own jurisdiction, but instead was bound by the probate court's determination that *it* had exclusive jurisdiction over Vickie's claim. The Ninth Circuit stated: "The probate court ruled it had exclusive jurisdiction over all of Vickie Lynn Marshall's claims against E. Pierce Marshall. *That ruling was binding on the United States district court.*" App. 35 (emphasis added).

Under the Ninth Circuit's analysis, where state and federal jurisdiction is concurrent, federal courts can be deprived of a key prerogative – the power to "*independently* determine" their own jurisdiction. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178 (1988) (emphasis added). But that clearly is not the law. *E.g.*, *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U.S. 207, 217 (1909) (federal court has the right to determine whether a case may be removed to federal court "independently of the jurisdiction and determination of the state courts"). As this Court has held:

> [E]ven if the Circuit Court had no jurisdiction to entertain [petitioner's claim], and if this Court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. *It and it alone necessarily had jurisdiction to decide whether the case was properly before it.*

United States v. Shipp, 203 U.S. 563, 573 (1906) (emphasis added).[34]

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[34] *See also United States v. Ruiz*, 536 U.S. 622, 628 (2002) ("a federal court always has jurisdiction to determine its own jurisdiction"); Ralph Brubaker, *Bankruptcy and the Probate Exception to Federal Jurisdiction*, 25 Bankr. Law Letter 1, 10 (March 2005) ("If the scope of the federal district court's jurisdiction . . . was, in fact, dependent upon the extent of exclusive probate jurisdiction in the Texas courts, it seems that the district court would be duty-bound to determine for itself the full extent of the Texas probate court's exclusive jurisdiction").

Because federal courts always have jurisdiction to determine their own jurisdiction, another court's jurisdictional analysis can never deprive them of that right. The Ninth Circuit held directly to the contrary.

The Ninth Circuit's analysis also leads to a direct conflict with *Exxon Mobil* which, as discussed above, held that federal jurisdiction is unaffected by the entry of a state court judgment. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517, 1527 (2005) ("federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court"). The Ninth Circuit's conclusion is directly contrary; by concluding that a state court's jurisdictional analysis controls the exercise of federal jurisdiction, it assumes that federal jurisdiction can evaporate – even, as here, years into a case – if a state court concludes *its* jurisdiction is exclusive.

Finally, even if a state court's judgment could somehow preclude a federal court's independent determination of its jurisdiction, that could happen only if state preclusion principles so dictated. Here, they do not. As we have shown, Texas law requires that a finding must have been "actually litigated" and "essential to the prior judgment" to have issue-preclusive effect. *See* note 30, *supra*. The Texas probate court's ruling that its jurisdiction was exclusive was neither. It was never "actually litigated" by the parties; instead, Pierce included it in a proposed judgment submitted several months *after* trial. SER 8666 (probate court judge: "[t]hat's a very unusual thing to put in a judgment in Texas"). Nor was the "exclusive" jurisdiction language essential to the prior judgment; to the contrary, it was entirely irrelevant to the probate court's *own* power to render judgment.

For all of these reasons, the "state law" test applied by the Ninth Circuit violates principles at the very core of federal jurisdiction. This Court should reject it.[35]

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the decision below should be reversed.

Respectfully submitted,

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[35] An independent evaluation of Texas law demonstrates, as the district court concluded, that the probate court did not have exclusive jurisdiction over Vickie's claim. App. 165-70. Under then applicable Texas law, courts of general jurisdiction had concurrent jurisdiction with statutory probate courts over "all actions" involving *inter vivos* trusts and testamentary trusts, even if such actions were "appertaining to" or "incident to" probate estates. *Shell Cortez Pipeline Co. v. Shores*, 127 S.W.3d 286, 293 (Tex. App. 2004); *Mobil Oil Corp. v. Shores*, 128 S.W.3d 718, 724 (Tex. App. 2004). In any event, a claim "appertain[s] to . . . or [is] incident to" a probate estate only if its outcome will directly bear on distribution of the estate. *See, e.g., Sobel v. Taylor*, 640 S.W.2d 704, 706-07 (Tex. App. 1982) (claims against trustees in individual capacity for conduct before decedent's death can proceed in district court); *Jansen v. Fitzpatrick*, 14 S.W.3d 426, 434 (Tex. App. 2000) (suits to set aside deathbed conveyance for undue influence can proceed in district court). Vickie's tort claim against Pierce has no effect on the estate. App. 28, 162, 166-67.